TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~235~~ 68.

THE UNITED STATES, APPELLANT,

vs.

THE UNITED VERDE COPPER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FILED JUNE 27, 1904.

(18986.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 335.

THE UNITED STATES, APPELLANT,

vs.

THE UNITED VERDE COPPER COMPANY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

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1 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
UNITED VERDE COPPER COMPANY, A corporation, defendant.

Be it remembered that heretofore and on, to wit, the 20th day of December, A. D. 1902, there was filed in said supreme court the transcript on appeal in the said above-entitled cause, which said transcript on appeal is in the words and figures as follows, to wit:

2 In the district court of the fourth judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the district and circuit courts of the United States.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
UNITED VERDE COPPER COMPANY, A corporation, defendant.

Comes now the above-named plaintiff and files this, its amended complaint, and alleges:

I.

That defendant is and at all times hereinafter mentioned has been a corporation, having its residence and principal place of business at Jerome, Yavapai County, Arizona Territory.

II.

That one Rafael Lopez did sell and deliver to the said defendant corporation and the said defendant corporation did buy from the said Rafael Lopez a large quantity of timber, to wit, six thousand four hundred ninety-six and one-eighth (6,496⅛) cords of wood.

3 III.

That the said timber and wood was wrongfully cut and caused to be cut and removed and caused to be removed by the said Rafael Lopez from unsurveyed public mineral lands of the United States, to-wit: that certain land in Mingus Mountains also known as Black Hill, which would be, if surveyed, townships 13 and 14 north, range 3 east, Gila and Salt River base and meridian, all in the county of Yavapai, Territory of Arizona, between the 15th day of February, 1900, and the 17th day of April, 1901, and was then and there sold to and bought by the said defendant, as aforesaid; that said Rafael Lopez was then and there a citizen of the United States and a bona fide resident of the Territory of Arizona.

IV.

That the value of said timber is the sum of ($6) six dollars per cord and of the aggregate value of thirty-eight thousand nine hundred seventy-six and 75/100 ($38,976.75) dollars.

V.

That all of said timber belonged to and was the property of the United States of America and that all of said timber was used and consumed by the said defendant.

VI.

Plaintiff further alleges that the said timber was used and con-
4 sumed by the said defendant for the purpose of roasting ore at the United Verde Copper mines, said mines being the property of defendant herein, at Jerome, Yavapai County, Arizona Territory, in violation of the act of Congress of June 3rd, 1878, and of the rules and regulations of the Secretary of the Interior, promulgated under the authority of said act of Congress.

Wherefore, plaintiff prays judgment against defendant for the sum of $38,976.75, lawful money of the United States of America and for its costs and disbursements in this action incurred.

FREDERICK S. NAVE,
United States Attorney for the Territory of Arizona.

5 In the district court of the fourth judicial district in and for the county of Yavapai, Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in district and circuit courts of the U. S.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
UNITED VERDE COPPER COMPANY, A CORPORATION, DEFENDANT.
} Amended answer.

The above-named defendant comes, and for its amended answer says:

FIRST.

It excepts to the sufficiency of plaintiff's complaint and demurs thereto—

1. Because said complaint does not state facts sufficient to constitute a cause of action against defendant.

2. Because said complaint alleges the cutting of timber from the public mineral lands of the United States for the purpose of roasting ores, which defendant had the right to do under act of June 3rd, 1878,
6 act of Congress of the United States, the said act of roasting ore being a purpose and part of defendant's mining business, and therefore licensed and permitted by said act of Congress.

Wherefore defendant prays judgment for cost and for general relief.

HAWKINS & WILSON,
Attorneys for Defendant.

SECOND DEFENSE.

For a second defense defendant says:

1. Defendant admits that it is a corporation, as alleged, with its principal place of business at Jerome, Yavapai County, Arizona.

2. In connection with the above admission defendant further shows to the court and avers—

(a) That it is the owner, in possession of, and is, and was, during all of the time of the cutting of said timber complained of in plaintiff's complaint, opening, developing, and operating its own mines near the city of Jerome, known as the United Verde group of mines.

(b) That in the said operation of said mines and carrying on of the said business of the said mining of said defendant, defendant during all of said time extracted from said mines of said company large and extensive quantities of copper, gold, and silver bearing ores, all of which was so heavily charged with sulphur that it made it as necessary to burn the sulphur out of all of said ores before treatment as it was to extract it from said mines in order to make said mining profitable to said
7 defendant and enable it to continue its said mining.

(c) Defendant therefore further gives the court to know, and alleges, that the said 6,496½ cords of wood so charged to have been unlawfully cut from the public mineral lands of the United States were so cut by Rafael Lopez, who was then and there a citizen of the United States and a bona fide resident of Arizona, under contract from defendant from said public mineral lands, and was used by defendant for the said purpose, and the only purpose, of burning the sulphur from its ores so extracted and mined from its own mines, and on its own mining ground, in order to prepare its said ore for treatment, to the extent that the said copper, gold, and silver contained therein might thereafter be extracted therefrom.

Wherefore defendant avers that the said wood was so used by defendant for its mining purposes; and that the same is permitted by act of Congress, approved June 3, 1878; because, therefore, defendant says "actio non;" and, therefore, prays judgment for cost and for general relief.

HAWKINS & WILSON,
Attorneys for Defendant.

THIRD DEFENSE.

For a third defense defendant avers:

That plaintiff should not be permitted to maintain her cause of action herein against defendant, because defendant avers that said Rafael Lopez cut and delivered said wood under contract with said defendant for said mining purposes.

That the said Lopez was a bona fide citizen of the United
8 States, and so are the incorporators of said defendant company.

That said timber was so cut and delivered to defendant before defendant had notice of any rule of the land department of the United States forbidding the same.

Wherefore defendant prays judgment for cost and for general relief.

HAWKINS & WILSON,
Attorneys for Defendant.

FOURTH DEFENSE.

For a fourth defense defendant says:

That plaintiff should not be permitted to recover $38,976.75, or any other sum, because defendant used said timber for said mining purposes.

Defendant further says that in the event its said defenses hereinbefore set up should not be sustained, the value of said timber as it stood on the ground was not of a sum exceeding ten cents per cord, and that such timber is not now worth more.

That defendant and said Lopez were not willful trespassers in any event, but were acting under the full belief, and still believe, that the same was authorized by said act of Congress.

9 Wherefore defendant prays judgment that plaintiff take nothing by her suit; that defendant go hence without day, with cost, and for general relief.

UNITED VERDE COPPER COMPANY,
By HAWKINS & WILSON,
Attorneys for Defendant.

In the district court of the fourth judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in district and circuit courts of the United States.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
UNITED VERDE COPPER COMPANY, A corporation, defendant.
} Judgment.

On this second day of December, 1902, this cause came on for hearing on the demurrer to the amended complaint herein;

Plaintiff appearing by United States attorney, F. S. Nave, and defendants, by its attorney, Hawkins & Wilson, and the cause having been argued to said court by respective counsel on the said demurrer to the said amended complaint, was submitted to the court for decision and judgment;

10 Now, on this third day of December, 1902, the court having considered the same, finds the issues of said demurrer in favor of the defendant and sustains the same, and the plaintiff having declined to amend its said amended complaint and having elected to stand on said amended complaint;

Now, therefore, it is ordered, adjudged, and decreed that the plaintiff take nothing by its said amended complaint, and defendant go hence without costs.

Done in open court this third day of December, 1902.

RICHARD E. SLOAN, *Judge.*

In the district court of the fourth judicial district of the Territory of Arizona, having and exercising the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in district and circuit courts of the United States.

November term, 1902. Hon. Richard E. Sloan, judge, presiding.

Minute record.

UNITED STATES
vs.
UNITED VERDE COPPER COMPANY. } No. 93 C.

NOVEMBER 17, 1902.

Case set for trial December 1st, 1902.

11 DECEMBER 2ND, 1902.

Demurrer to the complaint in said cause is submitted to the court by counsel without argument, Frederick S. Nave, U. S. attorney, personally appearing for the plaintiff, and J. J. Hawkins, esq., personally appearing for defendant.

DECEMBER 3RD, 1902.

The court being fully advised in the premises, sustains the demurrer to the complaint filed in said cause. Plaintiff, by the U. S. attorney, Frederick S. Nave, having refused to amend its said complaint, and having elected to stand thereon, it is ordered that it take nothing thereby and that judgment be entered for the defendant. Thereupon plaintiff, in open court, gave notice of appeal.

UNITED STATES OF AMERICA,
Territory of Arizona, Fourth Judicial District, ss:

I, J. M. Watts, clerk of the United States district court for the fourth judicial district of Arizona, do hereby certify that the above and foregoing is a full, true, and complete copy and transcript of the amended complaint, amended answer, judgment, and all minute entries of
12 record with notice of appeal, in the case of the United States vs. United Verde Copper Company, No. 93 C, as the same appears of record and on file in this office.

Witness my hand and the seal of said court at Prescott, this 13th day of December, A. D. 1902.

[SEAL.] J. M. WATTS, *Clerk.*

(Endorsed:) No. 816. In the supreme court of the Territory of Arizona. United States of America vs. United Verde Copper Company. Transcript on appeal. Filed Dec. 20, 1902. S. M. Cullom, clerk.

13 In the supreme court of the Territory of Arizona.

Be it remembered that heretofore and on to wit the 13th day of January, A. D. 1903, the same being one of the regular juridical days of the January term, A. D. 1903, of said court, the following order was had

and entered of record in said court, which said order is in words and figures, as follows, to wit:

UNITED STATES OF AMERICA, APPELLANT,
vs.
UNITED VERDE COPPER COMPANY, A CORPORATION, APPELLEE. } No. 816.

On motion of Jno. J. Hawkins, esq., attorney for appellee herein, it is ordered that this cause be submitted on briefs.

On Friday, March 20th, 1903, that being a regular juridical day of the January term, A. D. 1903, of said court, the following record in this case for this day was made, to wit:

[Title of cause.]

This cause having been heretofore submitted and by the court
14 taken under consideration, and the court having considered the same and being fully advised in the premises: It is ordered that the judgement of the lower court be and the same is hereby affirmed.

And afterwards and upon to wit the same day the following other order was had and entered of record in said court in said cause:

[Title of cause.]

In this cause Frederick S. Nave, esq., attorney for appellant, in open court, gave notice of appeal from the judgment of this court to the Supreme Court of the United States, and prayed the court for an allowance of such an appeal; whereupon, it was ordered by the court that an appeal be granted as prayed for, and the remittitur stayed for sixty days.

15 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
UNITED VERDE COPPER COMPANY, APPELLEE. } No. 816.

Appeal from the district court of the fourth judicial district. Hon. R. E. Sloan, judge.

Mr. Frederick S. Nave, U. S. attorney, and Mr. John H. Campbell, assistant U. S. attorney, for appellant; Mr. John J. Hawkins for appellee.

Opinion by DOAN, Justice:

The complaint in this action, brought by the United States against the United Verde Copper Company, a corporation, alleges that one Rafael Lopez, a citizen of the United States and a bona fide resident of the Territory of Arizona, between the 15th day of February, 1900, and the 17th day of April, 1901, wrongfully cut and removed from the unsurveyed public mineral lands of the United States a large amount of timber, the property of the United States, and sold the same to the defendant, and that the defendant used the timber for the purpose of roasting ore at its mines, situated in the Territory, in violation of
16 the act of Congress of June 3, 1878, and of the rules and regulations of the Secretary of the Interior promulgated under the authority of the act. A general demurrer was interposed to the com-

plaint, and a special demurrer on the ground that the complaint alleged that the timber was used by the defendant "for the purpose of roasting ore, which the defendant had a right to do under the act," such use being "licensed and permitted by the act." The demurrer was sustained and judgment entered thereon for the defendant.

The legal right of the United States to recover the value of the timber from the one who unlawfully cuts it or from any purchaser of such timber is well established. (Wooden Ware Co. v. United States, 106 U. S., 432; Northern Pac. R. R. Co. v. Lewis, 162 U. S., 376.)

The absolute ownership of these lands being in the United States, no one had the right to enter upon the lands or cut timber therefrom without its consent. The Government chose to make some exceptions in favor of certain classes of people, to whom were given the right to cut timber for certain purposes. The broad general rule being against the right, and the right to cut being exceptional for specified purposes only, such right, if acquired by the defendant by reason of the compliance with the provision of the statute, should have been shown by it. In the absence of evidence establishing such right the presumption is that the cutting is illegal, and as a matter of practice a complaint simply
17 alleging the cutting would state a cause of action, but in this instance the complaint has gone farther and has alleged the purposes for which and the conditions under which the cutting was done, thus relieving the defendant from the necessity of such showing, and has clearly presented for the consideration of the court the question whether or not timber cut from the public mineral domain may, under the terms of the act, be used for roasting ore.

If such use is within the terms of the act, then the demurrer to the complaint was properly sustained. If such use is not within the terms of the act, then the complaint states a good cause of action against the defendant.

The act in question, omitting the parts not material, is as follows:

"All citizens of the United States and other persons, bona fide residents of the * * * Territories of * * * Arizona, * * * shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes." (1 Supp. R. S., p. 166.)

Under this act the Secretary of the Interior, on January 18, 1900,
18 promulgated certain rules and regulations governing the felling and removing of timber from the public domain, for mining and domestic purposes, such rules, so far as material, being as follows:

"4. The uses for which the timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'

"5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber

product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

"7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

"10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this Department are hereby rescinded."

It will be observed that by section 7 of these rules the Secretary of the Interior decides that the use of timber for smelting purposes is not permitted under the license given by the above act, for the reason that smelting is a separate and distinct industry from that of mining. Under these rules this action was brought on the theory that the use of the timber for roasting ore was a use for smelting purposes and hence prohibited.

The power and authority of the Secretary of the Interior to make such rules as may be proper with respect to the cutting and removal of
19 timber under the act has been upheld by the courts. (North. Pac. R. R. Co. v. Lewis, 162 U. S., 376; U. S. v. Williams, 12 Pac., Mont., 851.)

While the act directly clothes the Secretary with the power to prescribe rules and regulations concerning the cutting and removal of timber, and his interpretation of the intent and true meaning of the act would be entitled to great weight, it will not be contended that the Secretary by any rule or regulation has the power to enlarge or restrict the purposes expressed in the act for which such timber may be used; so that, if by the act itself Congress has given the right to use such timber for roasting ore, any rule promulgated by the Secretary that would prohibit such use would be unauthorized and illegal. We have therefore to consider whether such use is authorized by the act itself. The act allows such use for building, agricultural, mining, and other domestic purposes. It is apparent, therefore, that if the use of timber for roasting ore is entitled to be classed as a use for "mining purposes," such use is within the terms of the act.

We think it was the intent of Congress by this act to encourage and develop the industry of mining, and in so doing to enable miners to make free use of the timber on the mineral lands in the development of their mines and for all purposes that may be classed under the head of mining, and that they were not restricted in such use to the employment of timber in the mine itself, but its application and use was
20 intended to be granted in the many ways requisite and necessary for the proper development of the industry.

While it was intended that those engaged in mining, whether individuals or incorporated companies, should have the privilege to cut and use timber necessary for the development of their mines and for purposes directly connected therewith, it was not the intention of Congress that plants erected for the independent business of smelting ores, commonly known as custom smelters, should be allowed to make use of such timber in such enterprises for the reason, as given by the Secretary of the Interior, that such business is "a separate and distinct industry from that of mining."

In the only case which we have found in which this question is discussed (United States vs. Richmond Mining Company, 40 Fed., 415),

the U. S. circuit court for Nevada held that the use of wood and charcoal in the reduction of ores and refining the product thereof by mill or furnace process, if not strictly a mining use, was certainly a use incident to mining and closely connected with it. Those engaged in reducing ores within the State were therein held to be within the benefits conferred by the above statute and entitled to use wood or timber cut from Government mineral lands for that purpose. The court in that case decided that the defendant company, a corporation, had full right
21 to purchase wood cut from public mineral lands and charcoal made from such wood, and use the same at its reduction works, and that the statute above cited was a complete defense to the action brought by the Government against it therefor.

This case was taken on writ of error to the U. S. Supreme Court, but was there dismissed on motion of the plaintiff in error without a review of the same, thus leaving the decision above cited the only authority we have on this question. This case was tried, however, prior to the adoption and promulgation of the rule above quoted.

We believe that the defendant in this instance was fully protected by the statute in using the wood sued for, under the license granted in the act to use wood for mining purposes, unless the roasting of ores should properly be classed as a part of the process of smelting and is for that reason not included in the general classification of mining purposes.

The complaint alleges that this wood was used by the defendant for the purpose of roasting ore at its mines in Yavapai County, Arizona. It is a matter of common knowledge that in this Territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore and thus, by the heat
22 generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphide or highly charged with other volatile substances are relieved from a large portion thereof and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction and are also lighter in weight and for that reason when shipped to other points for smelting or further treatment of any kind cost less for freight. Construing the pleading strictly against the pleader, as it is our duty to do, we must assume that the wood was not used in a custom smelter, but was used by the defendant for roasting ore obtained from its mines in the ordinary manner above described.

It is urged by the counsel for the appellant that—

"Both as a matter of common knowledge, and as a matter of definition of the words, 'roasting ore' is a part of the process of smelting, and the use of wood for the purpose of roasting ore as set forth in the complaint is using it for smelting purposes.

"Therefore the allegation of the complaint being that the timber was used by the appellee for roasting ore, it states a proper cause of action and is not obnoxious to demurrer."

In support of this proposition he quotes the definition from the Standard Dictionary of the verbs "smelt" and "roast," as follows:

"SMELT: To obtain (a metal) from the ore by a process that includes fusion; also in a more limited sense to reduce ores, sweepings, metallurgical products, etc., by fusion in a furnace."

23 "ROAST: (The only definition applicable in the discussion.) 4. Metal. To heat highly (metallic ores) with access of air, but without fusing, for the purpose of driving off or volatilizing impurities or for oxidizing them."

We think that from the authority herein cited by himself the counsel has proven the reverse of the proposition, and that without looking farther than the definition above it is shown that smelting, even in its more general sense, is the obtaining of metal from the ore by a process that includes fusion, while roasting ore is to heat highly with access of air, but without fusing, thereby distinguishing the roasting of ore from smelting rather than including it therein. But upon looking farther we find that the definitions given by Webster are:

"SMELT: 1. To melt or fuse, as ore, for the purpose of separating the metal from extraneous substances."

"ROAST: 5. To dissipate by heat the volatile parts of, as ores."

The definitions given by Worcester are:

"SMELT: 1. To melt or fuse, as ore, for the purpose of separating metal from extraneous substances."

"ROAST: 5. To expel volatile matters from by exposing to heat, as ores."

These are the general definitions as given in the dictionaries recognized as authority by the courts and by our people generally. But in the case of Lowrey v. Cowles Electric Smelting & Aluminum Co., 68 Fed., 354, Judge Taft, of the U. S. circuit court, has quoted in his

24 decision some very full and satisfactory definitions of these terms that will be of interest in this determination:

"'Smelting,' by its derivation, is synonymous with 'melting,' but in metallurgy and the commercial manufacture it has come to have a more contracted meaning. Thus Prof. Morton, the expert for the defendant, quotes from a treatise on metallurgy by Frederick Overman, this distinction between 'melting' and 'smelting':

"'When metallic ores are exposed to heat and such reagents as develop the metal we call it "smelting," in contradistinction from the mere application of heat, causing the ore to become fluid, which is called "melting."'

"Prof. Morton, however, is of the opinion that 'smelting' really means nothing more than 'melting apart,' and that any process in which the melting apart or separation of a metal from its ore is effected by the use of electricity is correctly described as electric smelting. * * *

"Prof. Langley, the expert for the complainant, thus defines 'smelt':

"'The word "smelt" is customarily applied to that class of metallurgical operations in which a metal results, said metal being in a metallic condition and obtained from an ore or mixture in which the metal originally existed in the form of a chemical compound. In all instances the operation of smelting results in producing something different from

the body operated upon, and this change is brought about by the action of heat and chemical force. * * * "Smelting," then, may be said generally to indicate the melting of something by heat, accompanied by a chemical change induced by the substances present in contact with the ore. * * * The substance added to bring about a chemical change in the earthy matters of the ore are called "fluxes," and they generally consist of limestone or of limestone and clay, so that in the practical sense of the word one may say the term "smelting" always involves melting by heat and the concomitant presence of a chemical change.'"

These definitions of the term "smelt," taken in connection with the fact that smelting is ordinarily accomplished by means of extensive plants erected for that purpose, and very often at great distances from the mines producing the ores smelted, while only the most extremely sulphide ores are roasted, and the roasting, when done, is frequently accomplished in a primitive manner by the combustion in the open air of the sulphur, arsenic, and more volatile portions of the ore, and in all cases, whether in the primitive manner mentioned or in reverberatory furnaces, is accomplished without any fusion or melting of the metal contained in the ore, satisfy us that the process of roasting ores, instead of being included in, is entirely different and distinct from smelting, and the use of wood therefor is properly included among the uses authorized by the statute for "mining purposes."

Where a company extracts the ores from its mines, carries that part needing such treatment to the roasting dump, uses wood in roasting therefrom the sulphur, arsenic, and other volatile substances, and then runs the ore through its reduction plant and converts the same into a merchantable product, the extraction of the ore from the mines, the roasting it upon the dumps preparatory for its final reduction in the furnaces and other reduction plants established for that purpose, is clearly a part of mining, and the whole process of such extraction and preparation, taken together, is within the protection of the statute.

We feel that in the consideration of this subject the practical, usual, and ordinary meaning of the words "mining" and "mining purposes," etc., should govern, rather than any narrow meaning that might be argued out from the definitions given by the lexicographers.

The roasting of the more sulphurous of the ore taken from the mine, on the dump near such mine, in order to prepare it for the operation of smelting, is as much a part of mining as the separation of the ore from the rock enclosing or surrounding it by the laborers, or the handling of such ore by machinery after having been taken from "in place." They are all steps toward taking the mineral from the elements originally mixed with it and surrounding it and preparing it for the purposes of reduction to metal in merchantable shape. They are not a part of or connected with smelting or any treatment of the ore during its reduction in the smelter. We feel that it was the intention of Congress in passing this act that it should be so construed in order that through the license therein granted the building up of the vast mineral resources of the nation might be accomplished, and the nation at large benefited as well

as the citizens of the mining regions, and the history of mining since the passage of this act has shown the wisdom of Congress in enacting the law.

The demurrer to the complaint was properly sustained.

27 The judgment of the lower court is therefore affirmed.

FLETCHER M. DOAN,
Associate Justice.

We concur:

EDWARD KENT, *C. J.*
GEO. R. DAVIS, *A. J.*

(Endorsed:) No. 816. In the supreme court of the Territory of Arizona. U. S. of America vs. United Verde Copper Co. Opinion by Doan, J. Recorded Book 5, pages 295–303. Filed March 20, 1903. S. M. Cullom, clerk.

28 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, appellant,
vs.
UNITED VERDE COPPER COMPANY, A CORPORATION, appellee. } Appeal.

Now comes the United States of America, and appeals from each and every the judgments, orders, and decrees rendered in the above-entitled cause, and prays that this appeal be allowed, and that a transcript of the record, and of all and singular the pleadings, orders, judgments, decrees, minute entries, and all other proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court of the United States may proceed to hear said cause, and that the said judgments, orders, and decrees appealed from may be reversed and a decree made in accordance with appellant's rights in the said cause, and for such other order, judgment, or decree as to the Supreme Court of the United States shall seem good.

FREDERICK S. NAVE,
United States Attorney for the Territory of Arizona.

The above appeal is hereby allowed, this 8th day of May,
29 A. D. 1903, and a transcript, as above prayed for, is ordered to be made and certified to the Supreme Court of the United States.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

(Endorsed:) No. 816. In the supreme court of the Territory of Arizona. United States of America vs. United Verde Copper Company, a corporation. Petition for and allowance of appeal to U. S. Supreme Court. Filed May 8th, 1903. S. M. Cullom, clerk.

30 *Clerk's certificate.*

UNITED STATES OF AMERICA,
Territory of Arizona, ss:

I, Shelby M. Cullom, clerk of the supreme court of the Territory of Arizona, do hereby certify that the foregoing pages, numbered from 1 to

28, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of United States of America, appellant, against the United Verde Copper Company, a corporation, appellee, as the same remain of record and on file in said office.

Also that the citation attached hereunto is the original citation issued by said supreme court of the Territory of Arizona.

I further certify that the assignment of errors attached hereunto is the original assignment of errors filed in said supreme court in said cause.

In testimony whereof I have caused the seal of the said supreme court of the Territory of Arizona to be hereunto affixed at the city of Phoenix, in the Territory of Arizona, this 2nd day of June, A. D. 1903.

[SEAL.] SHELBY M. CULLOM,
Clerk Supreme Court of the Territory of Arizona.

31 In the Supreme Court of the United States. October term, A. D. one thousand nine hundred and three.

UNITED STATES OF AMERICA, APPELLANT,
vs.
UNITED VERDE COPPER COMPANY, A CORPORATION, appellee. } Assignment of errors.

Now comes the United States of America, and shows that the supreme court of the Territory of Arizona erred in that:

1. It affirmed the order of the district court of the fourth judicial district of the Territory of Arizona, sustaining appellee's demurrer to the appellant's amended complaint filed in the above-entitled cause.

2. It affirmed the judgment of the district court of the fourth judicial district of the Territory of Arizona that the appellant take nothing by its amended complaint in said cause, and that the defendant go thence without costs.

FREDERICK S. NAVE,
United States Attorney for the Territory of Arizona.

32 (Indorsed:) No. 816. In the supreme court of the Territory of Arizona. United States of America vs. United Verde Copper Company. Assignment of errors. Filed May 23, 1903. S. M. Cullom, clerk.

33 In the supreme court of the Territory of Arizona.

UNITED STATES OF AMERICA, APPELLANT,
vs.
UNITED VERDE COPPER COMPANY, A CORPORATION, appellee. } Citation to defendant to appear before the Supreme Court of the United States.

To the United Verde Copper Company, a corporation, greeting:

Whereas the United States of America has lately appealed to the Supreme Court of the United States from a decree lately rendered in the supreme court of the Territory of Arizona, made in favor of you, in above-entitled cause, you are therefore hereby cited to appear before the said Supreme Court of the United States on the second Monday of

October next to do and receive what may pertain to justice in the premises.

Done this 8th day of May, A. D. 1903.

EDWARD KENT,
Chief Justice of the Supreme Court of the Territory of Arizona.

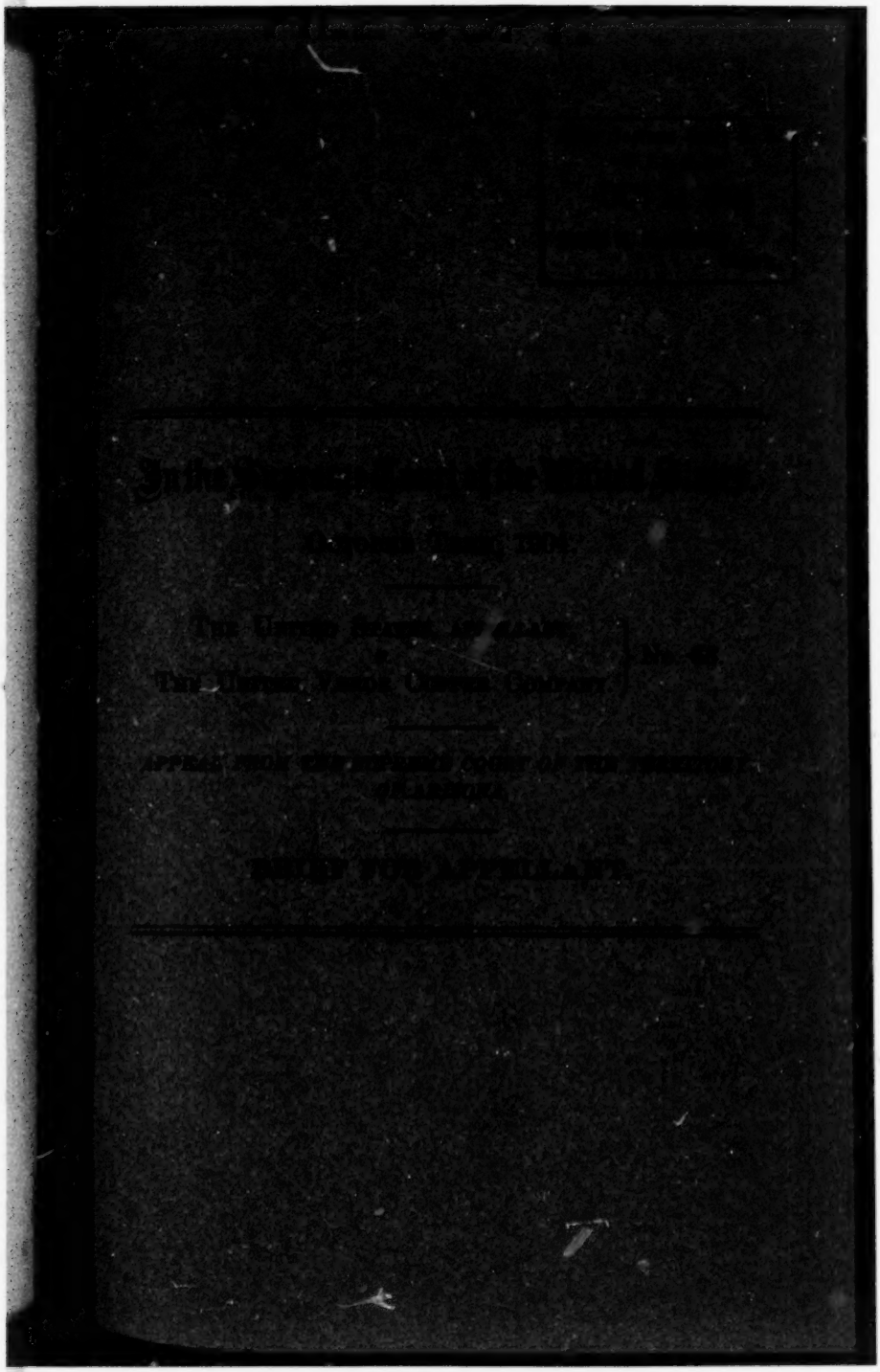
Due and legal service of the foregoing citation acknowledged this 23rd day of May, A. D. 1903.

UNITED VERDE COPPER COMPANY,
By JNO. J. HAWKINS, *Its Attorney.*

34 (Indorsed:) No. 816. In the supreme court of the Territory of Arizona. United States of America vs. United Verde Copper Company. Citation. Filed May 23, 1903. S. M. Cullom, clerk.

(Indorsement on cover:) File No. 18986. Territory of Arizona supreme court. Term No., 335. The United States, appellant, vs. The United Verde Copper Company. Filed June 27, 1893. Office of the clerk Supreme Court U. S. Received Jun. 27, 1903.

O



In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, APPELLANT,
v
THE UNITED VERDE COPPER COMPANY. } No. 68.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLANT.

STATEMENT.

This action was brought by the United States against the United Verde Copper Company, a corporation having its residence and principal place of business at Jerome, Arizona Territory, to recover the sum of $38,976.75, the value of cord wood wrongfully cut and removed from unsurveyed public mineral lands of the United States by one Rafael Lopez, a citizen of the United States and a bona fide resident of the Territory of Arizona, and sold to the defendant company. The defendant used the timber for the purpose of roasting ore at its mines, situated in the Territory of Arizona, which action the Government claims was not within the terms of the act of Congress

of June 3, 1878, and the rules and regulations of the Secretary of the Interior promulgated under authority of the act.

The complaint alleged such wrongful use on the part of the defendant company. A general and a special demurrer were filed to the complaint, the latter setting up that the cutting of timber from the public mineral lands of the United States for the purpose of roasting ores is lawful under the act of June 3, 1878. Other matters of defense were set forth which are not necessary here to be considered. The demurrer was sustained, and the plaintiff, declining to amend, took an appeal to the supreme court of the Territory of Arizona, which court affirmed the ruling of the lower court, and the opinion of the supreme court of Arizona upon which the decision is based is brought up here with the record.

The act of June 3, 1878, upon which the defendant relies as a defense to the suit, is as follows:

> That all citizens of the United States, and other persons, bona fide residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral entry, in either of said States, Territories, or districts of which such citizens or

persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Such of the rules and regulations of the Secretary of the Interior promulgated under the authority of this act as may be material to this case are as follows:

* * * * *

4. The uses for which the timber may be felled or removed are limited by the wording of the act to "building, agricultural, mining, or other domestic purposes."

5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or other timber product as an article of merchandise, or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

* * * * *

7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

* * * * *

10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this Department are hereby rescinded.

ARGUMENT.

RULE 7 IS WITHIN THE AUTHORITY GRANTED TO THE SECRETARY OF THE INTERIOR BY THE ACT OF JUNE 3, 1878.

Section 3 of the act in question shows the solemnity with which Congress acted in clothing the Secretary with authority to promulgate rules and regulations under which the license afforded by the act is to be exercised. That section declared that any person who shall violate the provisions of the act, or *any rules and regulations in pursuance thereof* made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and provides a penalty. It will also be noticed that in the first section of the act the privilege

is given to residents of certain States and Territories, *subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon said lands, and for other purposes.*

Not only did Congress solemnly grant the Secretary of the Interior a broad authority in regulating the scope of license granted by the act, but the Supreme Court has affirmatively recognized the validity and binding force of the regulations promulgated by the Secretary. The case of the *Northern Pacific Railroad Company* v. *Lewis* (162 U. S., 376) is a clear recognition of the controlling effect of the regulations. The court in that case said:

> No one had the right to cut a stick of timber thereon without its consent. * * * The Government, however, chooses to make some exceptions in favor of certain classes of people to whom was given the right to cut timber for certain purposes. * * * The cutting and removing were to be done *under rules and regulations prescribed by the Secretary of the Interior.* Outside of these exceptions, there was no right to any person to cut a particle of timber on these public lands of the Government.
>
> The right to cut is exceptional, and quite narrow, and for specified purposes only. The broad, general rule is against the right. If the plaintiffs had acquired the right by reason of a compliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting was illegal.

In the case of *United States* v. *Williams* (12 Pac. (Mont.), 851), the question of the validity of Rule 8 of the Secretary's regulations was before the court. Said rule is as follows:

> No growing trees of any kind whatsoever less than 8 inches in diameter are permitted to be cut.

The complaint alleged a violation of this rule, and in overruling a demurrer to the complaint the court says:

> No one has a right, independently of the statutes, to cut the timber on the public lands of the United States. The statute is the license to certain persons to cut and remove timber belonging to the Government for certain specified purposes. Certainly, Congress, in its generosity granting this permission, had the right to do so upon proper conditions, and to provide that the use of the license given *should be restricted by* rules and regulations to be prescribed by the proper Cabinet officer for the protection of the property of the Government.

In many cases the Supreme Court has recognized the authority of Congress to grant a privilege or license and to clothe an executive officer with the right to grant or refuse or restrict such permission under such rules and regulations as he may see fit to adopt in view of conditions as they exist from time to time. See *Williams* v. *United States*, 138 U. S., 514, 524; *Field* v. *Clark*, 143 id., 649, 680, 692; *Caha* v. *United States*, 152 id., 211, 218, 220; *in re Kollock*, 165 id., 526; *United States* v. *Ormsbee*, 74 Fed. Rep., 207, 209;

United States v. *City of Moline*, 82 id., 592, 598; *Wilkins* v. *United States*, 96 id., 837, 839, 841; *United States* v. *Dastervignes et al.*, 122 id., 30; *The Cin. Wil. & Z. Railroad Company* v. *Commissioners of Clinton County*, 1 Ohio St., 77, 87; *Locke's Appeal*, 72 Pa. St., 22 P. F. Smith, 491, 498, 499; *Port Royal Mining Company* v. *Hagood et al.*, 2 Law Rep. Ann., 841, 843, 844.

In the case of *United States* v. *Williams* (*supra*) the court uses the following language:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

What authority Congress intended to grant to the Secretary by the concluding words, "and for other purposes," is not easily determined. No judicial construction has ever been given them. To give them their ordinary meaning and effect is to hold that any authority not given by the specific grant is included in these general words; so that the latitude given to the Secretary would seem to be unlimited. When reference is had to the history of the original bill as debated and enacted the legislative intent becomes plain. The original bill as it first passed the Senate and as reported to the House (see Congressional Record, part 4,

Forty-fifth Congress, second session, pp. 3327–3328) provided that the license to cut timber on public mineral lands should be "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the undergrowth upon such lands." This provision was amended in the House so as to read as it stood when the bill became a law, viz, "subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes."

Referring to the phrase "and for other purposes," as used in the act, Judge Knowles, in *United States* v. *Mullan Fuel Company* (118 Fed., 663), said:

> Reputable attorneys might well differ as to the power conferred upon the Secretary of the Interior in the clause.

But that it has a meaning and was used advisedly is deducible from the fact that it was an amendment reported after serious and solemn deliberation by a committee. Prior to the adoption of the amendment by the House the following proceedings were had therein (see Congressional Record, part 4, Forty-fifth Congress, second session, p. 3328):

> Mr. FORD. Allow me to say that this bill seems to allow unlimited license to cut timber on the public lands to an unlimited number of persons. * * * The bill provides that the Secretary of the Interior may make rules and regulations to protect undergrowth, but it does

> not provide that he may make any regulations to protect the timber or to control this *unlimited license* which is given by the bill to cut timber. It seems to me that for the public good the Secretary of the Interior ought to be authorized to provide rules and regulations to *govern* this matter of cutting timber on the public lands.

Thus it seems that the purpose of the amendment was to clothe the Secretary with power to control, govern, and limit the license afforded by the bill.

The act in question was passed in 1878, when the West was thinly settled and when the spirit of encouragement to the settler was running high in Congress. Without timber he could not build his house, nor till his ground, nor work his mine. So the act of 1878, which applies to certain States and Territories which had not been fully developed and where timber was scarce, was passed. But Congress seems to have realized that it could not afford to grant to the public a right to take timber even for these purposes free from restraint or limitation. Nor could Congress know the real limitations under which the license should be exercised. Hence the Secretary of the Interior, as the guardian of the public lands, was authorized and empowered to determine in advance what might or might not be done, and certainly no greater or more comprehensive authority could be delegated than that which is carried in the language of the act. The license is to be exercised "subject to rules and regulations to be made by the Secretary for the protection of the timber

and of the undergrowth *and for other purposes.*" As was said in the Williams case (*supra*):

> It would be impossible for Congress to prescribe every detail governing the administration and management of every department of government; and if it were possible, it would not be wise.

And in Locke's Appeal (*supra*):

> There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must therefore be subject to inquiry and determination outside of the halls of legislation.

We do not contend that the Secretary of the Interior could suspend the operation of the act by promulgating a rule to that effect. But we do contend, and earnestly urge upon the court, that he has the power, by the very language of the act, to say within what limits, under each of the heads, viz, building, agricultural and mining, the license may be exercised. Congress used the word "mining," but it realized that it could not foresee all the sins that might be committed in its name. The same as to the other general purposes enumerated in the act. Hence the power in the Secretary to govern its use, and the wisdom of the provision is seen when we think of the public forests going up in smoke from raging fires built by the greedy licensee, who claims that mining embraces everything and every process in which metal plays a part. We repeat that the Secretary of the Interior—the one person capable of determining what is a proper

exercise of the license—is constituted the arbiter, and that any limitation he may prescribe, short of an absolute suspension of the right, has the force of law under the terms of this act.

Finally, we submit to the court that the case at bar comes within the well-known principle so often applied by this court that the construction of an act of Congress by those charged with its execution should not be disregarded by the judiciary unless the construction be clearly wrong.

> *United States* v. *Johnston*, 124 U. S., 236.
> *Heath* v. *Wallace*, 138 U. S., 573.
> *Hawley* v. *Diller*, 178 U. S., 476.

If there be a doubt as to the meaning of Congress the construction given by the Executive Department should control.

> *Pennoyer* v. *McConnaughy*, 140 U. S., 1.
> *United States* v. *Hill*, 120 U. S., 169.
> *United States* v. *Philbrick*, 120 U. S., 52.

In *Heath* v. *Wallace* (*supra*) the question was whether lands reported as "subject to periodical overflow" were "swamp and overflowed lands" within the meaning of the act of July 23, 1866, and Mr. Justice Lamar, delivering the opinion of the court, said:

> Moreover, if the question be considered in a somewhat different light, viz, as the contemporaneous construction of a statute by those officers of the Government whose duty it is to administer it, then the case would seem to be brought within the rule announced at a very early day in this court, and reiterated in a

> very large number of cases, that the construction given to a statute by those charged with the execution of it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

Such is our view of this act and the grant of power to the Secretary. But the learned judge below gives no effect whatever to the words of the act granting such power. His course in this respect was contrary to a very fundamental principle of construction. The judgment of the court is based upon only a part of the act. The construction placed upon the act by the Secretary was entirely ignored. If this action of the court below be correct, and we must look squarely at the word "mining" as used in the act, without regard to the authority given to the Secretary or to his construction, then the Government is prepared to make its case upon that theory, and we therefore leave this branch of the case with that end in view.

ROASTING ORE IS NOT A "MINING" PURPOSE.

Ignoring the regulations of the Secretary, made in pursuance of the act of Congress, let us see if the act affords the privilege contended for by the defendant. Said the supreme court of Arizona (Rec., p. 9):

> It is a matter of common knowledge that in this Territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the

ore, and thus, by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphide or highly charged with other volatile substances are relieved from a large portion thereof and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction and are also lighter in weight, and for that reason when shipped to other points for smelting or further treatment of any kind cost less for freight. Construing the pleading strictly against the pleader, as it is our duty to do, we must assume that the wood was not used in a custom smelter, but was used by the defendant for roasting ore obtained from its mines in the ordinary manner above described.

SMELT. The definition of the verb smelt, contained in the Standard Dictionary, is as follows:

> To obtain (a metal) from the ore by a process that includes fusion; also, in a more limited sense, to reduce (ores, sweepings, metallurgical products, etc.) by fusion in a furnace.
>
> In its restricted sense *smelting* is confined to a single operation, as the fusion of an iron ore in a shaft furnace, the reduction of a copper matte in a reverbatory furnace, and the extraction of a metal from sweepings in a crucible, but in its general sense it includes the entire treatment of the material from the crude ore to the finished metal, and embraces (1) *the calcination or roasting, by means of which the sulphur*

and other volatile constituents are expelled, (2) the reduction of the resulting products in a furnace, or the smelting proper, and (3) the refining of the product from the second operation.

The definition given in the Century Dictionary is practically the same.

And what is mining?

Mining is the act or business of making mines or of working them.—Webster.

Mining is the work of a miner or mine prospector.—Standard Dictionary.

MINE, v., 1. To dig a mine or pit in the earth; to get ore, metal, coal, or precious stones out of the earth; to dig in the earth for minerals; to dig a passage or cavity under anything in order to overthrow it by explosives or otherwise.

2. To form a subterraneous tunnel or hole; to form a burrow or lodge in the earth.

II, 1. To dig away or otherwise remove the substratum or foundation of; to lay a mine under; to sap; to undermine; hence, to ruin or destroy by slow degrees or secret means. 2. To dig into, for ore or metal. 3. To get metals out of the earth by digging.

MINE. n. 1. A subterranean cavity or passage; especially (a) a pit or excavation in the earth from which metallic ores, precious stones, coal, or other mineral substances are taken by digging; distinguished from the pits from which stones for architectural purposes are taken, and which are called quarries; (b) (Mil.) a cavity or tunnel made under a fortification or other work for the purpose of blowing up the superstructure with some explosive

> agent. 2. Any place where ores or metals or precious stones are got by digging or washing the soil, as a placer mine. 3. Figuratively, a rich source of wealth or other good.
>
> MINER. n. One who mines. A digger for metals, etc.; one engaged in the business of getting ore, coal, or precious stones out of the earth. *One who digs military mines.*
>
> MINING. n. The act or business of making mines or working them.
>
> MINING. a. Of or pertaining to mines, as mining engineer, mining machinery, etc.

But one case in which this question was discussed has been found. (*United States* v. *Richmond Mining Co.*, 40 Fed., 415.) But the point was not decided, although the case was cited by defendant and referred to in the opinion of the court below. After discussing the question of refining the product after it has been taken from the mine, and whether roasting ore is mining, the court in the *Richmond Company case* said (p. 419):

> But not to dwell upon this point, we may concede that reducing ores and refining the product *may not be strictly mining.* Still this business itself is a *domestic* industry of the highest importance to the miner and the public.

Thus, the court will see at once that the real question in issue in the case at bar was not decided in the Richmond Company case. The court, in the latter case, held the words *other domestic purposes* to embrace smelting. This ruling, we think, is entirely erroneous, and will be discussed farther on in this brief.

That roasting ore is a part of the process of smelting may clearly be seen from the very lucid explanation of that process given by the learned judge, and hereinbefore quoted, and from the definition of "smelt" as given by the Standard Dictionary, particularly the first process. Again to quote from the opinion of the court below:

> It is a matter of common knowledge that in this Territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore and thus, by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated.

And the first process of smelting as given by the Standard Dictionary is, in substance, the same, viz:

> (1) The calcination or roasting by means of which the sulphur and other volatile constituents are expelled.

And yet the court below, at page 9 of the record, says:

> We believe that the defendant in this instance was fully protected by the statute in using the wood sued for, under the license granted in the act to use the wood for mining purposes, unless *the roasting of ores should properly be classed as a part of the process of smelting* and is, for that reason, not included in the general classification of mining purposes.

Roasting is a part of the process of smelting and we submit that by its own reasoning the supreme court of Arizona should have reversed the trial court. Assuming, however, that smelting and roasting are distinct processes, one is certainly as far removed from mining as the other.

There is nothing in the opinion of the court which supports its view that the practical, usual, or ordinary meaning of the terms "mining" or "mining purposes" embraces any of the processes for extracting mineral from the ore after the same has been dug or taken from the ground. None of the text-books on mining law furnishes any support whatever for the meaning given to these terms by the court. Snyder on Mining Law, 2d vol, sec. 134, says:

> Mining in its general sense comprehends and includes the *digging and searching* for precious and economical metals and minerals.

There is a striking difference in the use of timber for shafting and shoring purposes in legitimate mining and a ruthless waste of timber for fuel, particularly when the fuel is used in such enormous quantities as are necessary in the process of smelting. To claim that Congress intended that the forests should be burned and wasted in such a manner is beyond all reason. And it is just as reasonable to claim that timber taken under the statute may be used to build a railroad for the purpose of transporting the product to market, as to contend that it may be used for the various processes through which the ore passes after it is mined.

WHAT DID CONGRESS MEAN BY "OTHER DOMESTIC PURPOSES?"

Having discussed the specific word "mining," and having shown to the court, as we think, that the defense to this suit can not rest thereon, we refer to the only other possible source of license in the act, viz, the phrase "or other domestic purposes," which seems to be the basis of the decision of the court in the Richmond Company case.

In the first place, the Richmond Company case was decided prior to the promulgation of Rule 7 by the Secretary. The decision in that case was rendered November 23, 1889, and the rules adopted by the Secretary, pursuant to the authority given him by the act of Congress, were issued January 18, 1900. (Rec., p. 7.) And the court below, in the case now at bar, considered this a very important and material fact, for in commenting upon the Richmond Company case, it said:

> This case was taken on writ of error to the United States Supreme Court, but was there dismissed on motion of the plaintiff in error without a review of the same, thus leaving the decision above cited the only authority we have on this question. *This case was tried, however, prior to the adoption and promulgation of the rule (7) above quoted.* (Rec., p. 9.)

The statute does not plainly indicate the sense in which Congress used the word "domestic." That word appears to have four possible meanings:

> (1) Belonging to the house or household and its relations.

(2) Addicted or adapted to family life, etc.

(3) Tame.

(4) Of or pertaining to one's own State or country.

It will be conceded that the sense in which Congress used the word is embraced either in No. 1 or No. 4. But the real intention is rendered obscure by the use of the word "other." The specific enumeration, "building, agricultural, and mining," is of no value whatever if the word "other" means "local," because Congress could easily have said "for *domestic purposes*" without any specific enumeration. We urge upon the court the simple proposition that Congress used the word "domestic" as belonging to the household. This makes it necessary to reject, as surplusage, the word "other," but how much nearer is this an adherence to the rule that effect, if possible, must be given to every word than to strike from the statute the three words "building, agricultural, mining?" This view makes it perfectly clear that Congress used the word "domestic" as meaning "household." In other words, it becomes perfectly apparent that Congress granted the right to use the timber for the specific purposes, viz, building, agricultural, and mining, and for domestic (household) purposes generally. Particularly is this view reasonable and tenable when we consider the object of the legislation which was to offer encouragement and aid to the individual settler. That the word "other" was unintentionally permitted to creep into the body of this act may be seen from the title, which

reads as follows: "An act authorizing citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes." It will be seen that the word "other" does not occur in this title.

Again, Congress provided, in the very beginning of the act, that the timber could be used only for domestic (local) purposes, by limiting the taking to *bona fide* residents of the States and Territories in which the license may be exercised. To limit the taking to *bona fide* residents is certainly to limit its use to the States and Territories of which such persons are residents.

It deserves the consideration of the court that Congress had already, at the same session and only a few weeks before it passed the act of June 3, 1878, under which this suit is sought to be defended, passed the act of April 30, 1878 (1 Sup. R. S. U. S., 159), which reads, in part, as follows:

> If any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found.

This general inhibition covers the word "domestic" in the sense of "local" and applies to timber cut in any of the Territories of the United States under any of the various permissive statutes.

To give force to the position we take the attention of the court is invited to the act of March 3, 1891, "An act to amend section 8 of an act approved March 3, one thousand eight hundred and ninety-one, entitled

'An act to repeal timber-culture laws and for other purposes.'" Said section 8, as amended, reads as follows:

> That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of said patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the district of Alaska, and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such States or Territories by a resident thereof for *agricultural, mining, manufacturing, or domestic purposes* under rules and regulations made and prescribed by the Secretary of the Interior, and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company, etc.

This statute has no direct application to the case at bar. It is merely cited to show that the word "other" was not used to indicate the same class of uses as those embraced by the specifically mentioned purposes. That the word "domestic" was not used in the sense

of "local" is clearly indicated by the condition that the timber shall not be transported out of the States or Territories in which it is cut. To give to the word "domestic," as used in the statute above quoted, the meaning of "local" would render superfluous the entire phrase "and has not been transported out of the same."

While there is no lack of faith in submitting the foregoing propositions, it may not be inappropriate to suggest to the court the only other tenable theory of the intention of Congress in framing the act, viz, to use the word "other" correlatively with the first two uses, i. e., building and agricultural, and to distinguish between those uses and "mining." In other words, it is fairly within the range of possibility that Congress considered the erection of dwellings and barns and the cultivation of the soil domestic operations and intended to distinguish between them and mining, the latter being an enterprise of greater magnitude and of a strictly commercial character. The title of the act, which reads "for mining and domestic purposes," supports this view of the case.

STATUTE MUST BE CONSTRUED STRICTLY.

If the real intention of Congress can not be ascertained from the act itself, or from the meaning of the words used therein, we urge that the character of the act must be considered and the proper rules of construction applied. The statute is permissive. Statutes which grant property privileges are to be construed most strictly in favor of the Government and a use not

unequivocally authorized by the language of the act must be excluded.

Sutherland, Stat. Const., sec. 378.

Slidell v. *Grandjean*, 111 U. S., 412, 437.

Central Transp. Co. v. *Pullman Co.*, 139 U. S., 24, 49.

United States v. *Dastervignes*, 118 Fed. Rep., 199, 200.

Endlich, section 354, says:

> As regards enactments of a local or personal character, which confer any exceptional exemption from a common burden, or invest private persons or bodies for their own benefit and profits with privileges and powers interfering with the property or rights of others, they are construed more strictly, perhaps, than any other kind of enactment. The courts take notice that they are obtained on the petitions framed by their promoters; and, in construing them, regard them, as they are in effect, contracts between those persons, or those whom they represent, and the legislature on behalf of the public. Their language is therefore treated as the language of their promoters, who ask the legislature for them; (the promoters, rather than the legislature, being considered as the framers); and when doubt arises as to the construction of that language, the maxim, ordinarily inapplicable to the interpretation of statutes, that *verba cartarum fortius accipiuntur contra preferentem*, or that words are to be understood most strongly against him who uses them, is justly applied. The benefit of the doubt is to

> be given to those who might be prejudiced by the exercise of the powers which the enactment grants, and against those who claim to exercise them. Even if such statutes were not regarded in the light of contracts (*a*), they would seem to be subject to strict construction on the same ground as grants from the Crown, to which they are analogous, are subject to it.
>
> * * * * *
>
> A legislative grant is, indeed, like any other legislative enactment, to be construed, if possible, so as to effect the intent of the grantors; if that intent is doubtful, under the statute making it, the rule of construction recognized as applicable requires the doubt to be resolved against the grantee, in favor of the public.

For the reasons given we think that the decisions of the Territorial courts of Arizona should be reversed and the case remanded for trial. Sparse as is the timber remaining in the arid portions of this country, there is neither reason nor justice in making wholesale use of it merely to cheapen the product of its mines or enhance the dividends of great and prosperous corporations by stretching the already liberal provisions made by Congress to an extent that will with certainty denude the mountains of that region and eventually bring about a train of evils already apparent in many ways.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

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In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES,
Appellant,

AGAINST

THE UNITED VERDE COPPER COMPANY,
Appellee.

No 68.

Brief for United Verde Copper Company, Appellee, on Appeal from the Supreme Court of Arizona.

Statement of Facts in the Case.—This action was brought by the United States to recover $38,976.75, the alleged value of certain wood cut by one Rafael Lopez and sold to the defendant and used by it for the purpose of roasting ore.

The complaint alleges that Lopez is a resident of Arizona and that the defendant is a resident corporation; that the wood in question was cut from unsurveyed public mineral lands of the United States, situate in Arizona and sold to the defendant and then adds:

> "Plaintiff further alleges that the said timber was "used and consumed by the said defendant for the "purpose of roasting ore at the United Verde Copper

"mines, said mines being the property of defendant "herein, at Jerome, Yavapai County, Arizona Terri- "tory, in violation of the Act of Congress of June 3rd, "1878, and of the rules and regulations of the Secre- "tary of the Interior, promulgated under the author- "ity of said Act of Congress."

To this the defendant demurred on the ground that the complaint did not state a cause of action, and that the defendant had a right under the act to use the timber for roasting its ores. The demurrer was sustained by the District Court for the Fourth District of Arizona. Plaintiff declined to amend its complaint and thereupon appealed to the Supreme Court of the Territory of Arizona, which Court affirmed the decision below. The plaintiff now appeals to this Court.

It is claimed by appellant that the use of the timber is not only forbidden by the act itself, but that it is especially in contravention of Rule Seven of the Regulations of the Secretary of the Interior, which forbids the use of such timber for smelting. This appeal therefore presents these questions.

First.—Whether the words "for building, agricultural, mining and other domestic purposes," as used in the Act of June 3rd, 1878, are broad enough to include the acts of the defendant complained of; and,

Second.—Whether the rule promulgated by the Secretary of the Interior in 1900 forbidding the use of the timber in question for smelting constitutes a valid prohibition of its use for roasting ore.

The regulation referred to was not issued until the year 1900, twenty-two years after the passage of the Act, and

it is believed that up to the time of the commencement of this action in December, 1902, the right of miners to use government timber for roasting ore under the Act of 1878 had never been seriously questioned during the twenty-four preceding years except in the case of the *United States* v. *Richmond Mining Co.* 40 Fed. Rep. 415, decided in 1889, where the said right was upheld by the U. S. Circuit Court of Nevada.

The Arizona Supreme Court in the present case held in a well considered and exhaustive opinion that the process of smelting referred to by the Secretary did not include roasting, the latter being really a process of mining; that the practical, usual and ordinary meaning of the words mining and mining purposes should prevail in the construction of the act rather than any narrow meaning that might be argued out of the definitions given by the lexicographers *(See Record, p. 11)*.

Argument for the Appellee the United Verde Copper Company.

FIRST POINT.—The acts of the Defendant come well within the permissive provisions of section 24 of the Act of June 3, 1878, Chapter 150.

First.—The language of the act stated.

The relevant portion of the act in question is as follows:

> "*Sec. 1.* Be it enacted, &c., That all citizens of the "United States and other persons, *bona fide* resi- "dents of the State of Colorado, or Nevada, or either "of the Territories of New Mexico, Arizona, Utah,

"Wyoming, Dakota, Idaho, or Montana, and all other "mineral districts of the United States, shall be, and "are hereby authorized and permitted to fell and re- "move, *for building, agricultural, mining, or other "domestic purposes,* any timber or other trees grow- "ing or being on the public lands, said lands being "mineral, and not subject to entry under existing "laws of the United States, except for mineral entry, "in either of said States, Territories, or districts of "which such citizens or persons may be at the time "bona fide residents, subject to such rules and regu- "lations as the Secretary of the Interior may pre- "scribe for the protection of the timber and of the "undergrowth growing upon such lands, and for "other purposes: *Provided,* the provisions of this "act shall not extend to railroad corporations."

The appellee claims and it was decided below, that roasting ore comes within the definition of the mining purposes intended by the Act; also that "domestic" purposes as therein stated means "local" purposes and therefore that the process of roasting ores if not included in the mining purposes referred to is included in the "domestic purposes" for which timber may lawfully be used.

Second.—The phrase "domestic purposes" in the Act means the same as "local purposes."

We agree with counsel for the appellant that the word *"domestic"* standing alone is susceptible of four meanings, two of which are possible here, viz.: *"local"* and *"household."* It is now urged by the United States that it is not here used in the sense of *"local,"* but rather in the sense of "household." But this construction is erroneous. The phrase *"domestic purposes"* in the Act

means *local purposes.* That is to say it not only adds to the preceding words "building, agricultural, mining," but it also qualifies them. The purposes to be lawful must be *domestic,* that is *local.* The timber cannot be removed beyond the State or Territory where found.

Unless this was the intent and unless the word "*domestic*" was used in the sense of "*local,*" the Act would have authorized the use of the timber in question for building, agricultural, mining or household purposes anywhere and therefore the removal from the territory of such timber, which of course was never intended by Congress.

The phrase "in either of said States, Territories or Districts of which such citizens or persons may be at the time *bona fide* residents," does not refer to the use, but merely to the cutting, and that phrase is merely descriptive of the *place* where the timber may be cut.

To make this perfectly clear omit the phrase "said "lands being mineral and not subject to entry under ex- "isting laws of the United States except in mineral en- "try," which might well have been enclosed in a parenthesis and then the statute will read omitting parenthetic matter:—

> "That all citizens, &c., shall be, and are hereby "authorized and permitted to fell and remove, *for "building, agricultural, mining, or other domestic "purposes,* any timber or other trees growing or be- "ing on the public lands, in either of said States, Ter- "ritories, or Districts of which such citizens or per- "sons may be at the time *bona fide* residents, subject "&c."

The Act therefore means to provide, in substance, that *bona fide* residents of said States, Territories or Districts may fell and remove the timber referred to for local pur-

poses, whether building, agricultural, mining or other similar purposes, and the word "domestic" must mean "local," otherwise there is nothing in the Act limiting the use to local purposes as was necessarily intended by Congress.

The appellant's substitution of the word "household" for the word "domestic" would totally eliminate the word "other" from the Statutes. You may say building, agricultural, mining or household purposes, but you cannot rationally say "building, agricultural, mining, or *other household* purposes. But there is no authority for the elimination of the word "other," which would be contrary to well established rules.

On the other hand by construing the word "domestic" as meaning "local" we have an act permitting the use of this timber for the general purpose of building up the respective Territories by aiding mining, agriculture and home building, a natural and salutary law. A comparison of the statute is given below with the word "local" substituted for "domestic" in the one case and "household" for "domestic" in the other case. From this it is seen how clear and logical is the first construction, and how contradictory and meaningless is the second.

> All citizens, &c., "shall be * * * permitted to "fell and remove for building, agricultural, mining, "or other local purposes, any timber, etc."

> All citizens, &c., "shall be * * * permitted to "fell and remove for building, agricultural, mining "or *other* household purposes, any timber, etc."

The criticism of the appellant that the use of word "*domestic*" meaning "*local*" would involve an unnecessary repetition, is without force. It is usual in this

Act as in others to specify principal cases and then use a comprehensive and qualifying word to limit and control them. Thus we have elsewhere in this Act the expression "All citizens of the United States and other persons *bona fide* residents, &c.," and other similar instances. In like manner we may say, "for military, naval and *other* warlike purposes;" or an authority may be given to make "notes, due bills or *other* promises to pay;" or we may say for medical, surgical or *other* sanitary purposes, meaning other similar warlike purposes; other similar promises to pay; other similar sanitary purposes respectively. In each case the last adjective comprehends and qualifies the others. Here what was meant in the Act was building, agricultural, mining or other *similar* domestic (local) purposes.

Another consideration showing that the word "domestic" in the Act means "local" and not "household" is found in the concluding words of the section, as follows:

> "*Provided* the provisions of this Act shall not ex-
> "tend to railroad corporations."

This restriction was obviously intended to prevent the taking of timber for railroad ties and fuel. At the time this Act was passed June 3rd, 1878, but a few miles of railways had been constructed in the States and Territories mentioned in the Act. Charters, however, had been granted for several great trans-territorial railroads, namely, the Northern Pacific running the length of Montana, the Texas Pacific and Atlantic Pacific across New Mexico and Arizona, and many others in the construction of which a vast amount of timber would be necessary. It it further to be remembered that at that time many locomotives were wood burners. It was evidently to prevent

this enormous use of timber for ties and fuel by railroads that this provision in the Act was inserted. But why was it necessary to except railroads from the language of the Act unless the word "domestic" meant "local?" Railroads were certainly not likely to use timber for building, agricultural, mining or household purposes to any appreciable extent, whereas the use of timber for ties or fuel in locomotives might be construed as a *local* use were it not for this exception in the Act.

Third.—Prior judicial constructions of the meaning of the word domestic.

The only judicial constructions of the statute in question uphold the defendant's contention.

In *United States* v. *Richmond Mining Co.*, 40 Fed. Rep., 415, U. S. C. C. Nev. (1889), the identical statute here in question was under consideration and it was there held that the words "other domestic purposes" were equivalent to "other domestic industries" and included processes connected with mining.

The Court says: (SABINE, *J.*:)

> "It is urged with some earnestness that, as it is "shown that this wood and coal were to be used in "the reduction of ores and refining the product there- "of, such a use is not a mining use properly; that "reducing ores by mill or furnace process, and re- "fining the bullion, is not a part of mining. * * * "In a very restricted sense it may be true that min- "ing is limited to the breaking down or digging up "of ore in place. * * * But not to dwell upon "this point we may concede that reducing ores and "refining the product may not be strictly mining.

"Still this business by itself is a domestic industry "of the highest importance to the miner and to the "public. * * * The miner is not the only person "benefitted by the statute. It applies to all alike "who use this wood or timber for *domestic or local* "use within the State. And it matters not whether "such reduction works, mills or furnaces are engaged "in reducing ores from mines owned by the propri- "etors of the works, or are engaged in reducing pur- "chased ores, or in what is usually called 'custom "'work,' for pay, toll, or tribute from the owner of "the ores reduced. All industries within the State, "not prohibited from such use, are within the pro- "tection of the statute."

The decision in this Nevada case is broad enough to include smelting or reducing purchased ores which is much farther than the appellee asks the Court to go in this case.

In *United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S., 495, the facts were almost identical with those of the case at bar. It seemed to have been conceded in the Court below that the use of the wood for smelting purposes was lawful, and the sole point at issue was the question of whether Ross who cut the timber, was a citizen and resident. The jury found in favor of the defendant and the plaintiff appealed to the Supreme Court on the ground that there was no evidence that Ross was a citizen. The judgment was affirmed without considering other questions, but at page 497, Judge Peckham, who delivered the opinion, says:

"The verdict must be regarded as a finding that "Ross was a citizen of the United States and a *bona* "*fide* resident of the Territory when the cutting was "done. If he were, there is no question made about "his right to cut."

There was no intimation in the opinion that any error had been committed by the Court below in its construction of the statute.

Fourth.—Answer to Appellants references to the title of this Act and to other Acts of Congress on the question of construction.

The appellant's Counsel refers to the title of the Act in support of his claim that the word "domestic" there means "belonging to the household." But thus used it would be imperfect and misleading. Building and agricultural purposes may be "local" but they cannot be considered "household" purposes.

Counsel for the appellant, calls the attention of the Court to the Act of April 30, 1878, passed a few weeks before the Act under consideration here, and which reads in part as follows:

> "If any timber cut on the public lands shall be exported from the Territories of the United States it shall be liable to seizure by United States authority wherever found."

The argument sought to be based on this Act is that as it in terms limited the use of timber to the locality where cut, it was unnecessary in the subsequent Act of June 3, 1878, to so limit such use and therefore Congress could not have intended to do so, and therefore it is further urged that the word "domestic" in the Act before us cannot mean "local." But these two Acts cover different subjects. The Act of April is prohibitive and forbids export from the Territories only and not merely from one Territory to another; and the Act of June 3rd, 1878, was

permissive, and permits use within the State or Territory. The policy of both is the same. In both cases the domestic or local use is permitted and the export is forbidden. To encourage local use and not merely use for household purposes was what was in the mind of Congress in both cases.

Reference is also made by the appellant to Section 8 of the Act of March 3rd, 1891, entitled "An Act to Repeal "Timber Culture Laws and for other Purposes."

It is conceded by the Appellant that this statute has no direct application to the case at bar, but he cites it merely as an instance where the word "domestic" is claimed to have been used in the sense of the word "household" in a timber Act. The construction of this Act of 1891, is no more authoritative in dealing with the construction of the Act of 1878, than the construction of the latter Act would be in dealing with the former. But this much is evident that by the inclusion of the word "manufacture" in the Act of 1891, Congress emphasized the policy of a liberal use of government timber lands for the development of the Territories and States referred to.

Other instances might be quoted where the use of the word "domestic" seems to have been loosely made, probably copied from other similar Acts without much close scrutiny of its real meaning or application. Such instances have no relevancy here, and, moreover, in every one of such Acts there is more difficulty with the narrow construction of the word as meaning "household" than there would be with the construction contended for here.

Fifth.—The roasting of ore is a mining purpose within the meaning of the Act.

The statute permits the use of timber for mining purposes. The language is: "For building, agricultural, mining, or other domestic purposes." The timber may be used not only for mining but for *purposes* connected with mining. We respectfully insist that such purposes include the roasting of ore by the defendant which is made the basis of this action.

What is mining? Webster defines the verb "to mine" "To get ore metals, coal or precious stones out of the "earth." In a broad sense it must mean separating ore or metal from the earth. The roasting of ore is certainly a purpose connected with mining as thus defined and having the same object. It is a part of the system of mining carried on by the appellee at its mines at Jerome, Arizona. The ore is extracted from the mines and carried to the roasting dump adjoining, where the process of roasting consists merely in the application of fire to the ore and separating therefrom the sulphur, arsenic and other volatile substances. It is the continuation of the work of the miner with the pick. The separation of the ore from the other substances which are found with it is not fully completed by the work of the miner in the mine itself and has to be finished by the process of roasting outside the mine. It is therefore not necessary here to discuss the process of smelting the ore, which is a subsequent and entirely different process.

The *Encyclopedia Brittanica* in its article on Mining, defines the term and its use of it as follows:

> "The art of mining consists of those processes by "which useful minerals are obtained from the earth's

"crust. This definition is wider than what is popu-
"larly known as 'mining,' for it includes not only
"underground excavations, but also open workings.
"* * * *Furthermore as it is customary for a miner*
"to cleanse his ore to a greater or less extent before
"selling it to the smelter, we have under the head of
"mining, included those processes which are com-
"monly known as the dressing or mechanical prep-
"aration of ores."

The roasting complained of here was a mechanical preparation of the ore prior to smelting it and the definition of mining given above, considered broadly, will therefore include roasting, though the process itself is not specifically referred to anywhere in the Article.

Sixth.—Consideration of conditions at the time the Act was passed.

A glance at the conditions existing at the time of the passage of the Act strengthens the argument in favor of the construction claimed by the appellee. At the time the States and Territories in question were only partially explored, little known and but sparsely settled; their immense mineral wealth was suspected or known, but almost wholly undeveloped. The mines were few and primitive. The use of timber therein for shafting and shoring only would hardly be worth considering. Congress intended by the Act of 1878 to give to the inhabitants of the various States and Territories a general use of the timber upon the mining lands in order to stimulate the growth and prosperity of those regions. That this would not have entailed any great waste of material is easily seen by a reference to the population and industrial conditions of

said States and Territories. The census of 1870 gave the population of Arizona as 9,658, New Mexico 91,870, Montana 20,595, Colorado 34,000, and Wyoming 9,118. In Arizona this would show a density of population of one person to every ten square miles. Manufactures on a large scale were unknown and even the most limited manufacturing operations were few. The timber in those sections was considered of little value, and the lack of transportation facilities limited to a very small area the use of it. And even as late as 1891 and after these States and Territories had increased enormously in population and in transportation facilities, Congress by the Act of March 3, 1891, granted them a free local use of the public timber, including manufacturing purposes and even extended it to other regions.

Seventh.—This is a remedial statute and should be liberally construed in favor of the citizen.

The Attorney General contends that the Statute of 1878 should be strictly construed in favor of the Government; that is to say against the mine owners and cites *Endlich* (Sec. 354) and other authorities covering instances of grants to individuals and corporations, to the effect that acts conferring special privileges are to be so construed. The principle is conceded and its reason obvious, but this is not such a case. This is a case of a remedial statute which should be liberally construed to effect the end proposed, namely, the development of the regions referred to in the Act. Is this Act to be construed strictly against the agriculturalists, builders, miners, manufacturers and others on the ground that it invests them with special privileges? Were all these farmers, miners, builders, &c., mo-

nopolists? Were they, as the Attorney General seems to insinuate by his citation from Endlich, promoters who obtained the Act on their petition? Not at all. They constituted practically the whole population, and the beneficent grant of Congress was conferred on all on equal and just terms.

Eighth.—Light thrown by the Act of 1891 on the construction of this Act.

Endlich further states, however, (Sec. 354) that where a statute is doubtful a "familiar principle of statutory "interpretation requires the construction to be such as "will make it accord with subsequent legislation."

Now here we find that by the Act of March 3, 1891, Chap. 561, Sec. 8, a free use of timber is permitted within the Territories included in the Act in question and others in addition, for "agricultural, mining, *manufacturing* or "domestic purposes" within the State or Territory in which it is cut. Since the appellant claims that roasting ore is not mining it must be manufacturing which was in terms permitted by the Act of 1891, and on the principle of construction above stated by Endlich, may be supposed to have been intended by the Act of 1878.

Ninth.—The report of the Senate Committee in charge of the Bill shows its remedial nature.

The Act of June 3, 1878, was originally known as Senate Bill No. 20 and was passed by the Forty-fifth Congress. The material part of the report of the Senate Committee is as follows:

"The committee have carefully considered the sub-
"ject of timber and timber lands and after mature
"deliberation with a view of devising the best method
"of preserving, cultivating and disposing of the
"same, have come to the conclusion that a distinc-
"tion should be made between such trees as grow
"upon mountains in the mineral districts, and the
"forest, pine, oak and other timber that grow in
"the more level portions of the country. While the
"lumber of the latter is a regular and important
"article of commerce and is constantly being cut and
"transported in large quantities to ready markets,
"the character of the former renders the timber
"unfit except for mining purposes. Even, were this
"otherwise, it is usually found in such inaccessible
"places as to preclude its transportation to market,
"consequently it is used by the prospector, the miner,
"and other members of mining communities for
"domestic and other practical purposes incidental
"to the development of mineral districts. The com-
"mittee do not believe that it would be wise policy
"on the part of the government to seek to profit di-
"rectly by the sale of this kind of timber nor to tax
"the pioneer by compelling him to purchase it. Ex-
"cept as a source of revenue by the sale to the settler
"it can never be of any value to the government.
"Should the experiment be tried of requiring pay-
"ment for it, it would be found that the cost of keep-
"ing agents for its sale and officers to prevent or
"punish infractions of the law at remote and widely-
"separated settlements, would largely consume all
"sums received for this timber by the government.
"Thus, while it is practically of but little value to
"the government, it is essential to the settler and
"indispensable to his occupation and development
"of the mineral lands. It has been the custom of
"Congress to encourage the exploration and develop-
"ment of the mineral regions of the United States;

"and in this connection it should be borne in mind "that it is mainly to the indomitable energy, hardi- "hood and daring of the pioneer that we are indebted "for the discovery of the rich gold and silver dis- "tricts of the country."

SECOND POINT.—The Seventh Regulation of the Department of the Interior did not make unlawful the acts of the Defendant complained of.

First.—As to the interpretation of the rule:

Section 7 of these rules provides:

"No timber is permitted to be used for smelting "purposes, smelting being a separate and distinct "industry from that of mining."

Of course it will not be claimed that the Secretary had authority to legislate or to overrule the Act of Congress or had any intention to do so. The inhabitants of those regions were granted by Congress the absolute right to fell and remove timber, etc., for mining or other domestic purposes—

"subject to such rules and regulations as the Sec- "retary of the Interior may prescribe for the protec- "tion of the timber and of the undergrowth growing "upon such lands; and for other purposes."

If therefore roasting ore be a mining purpose the Secretary could not prohibit it. He could only regulate it. And it is to be presumed that he attempted no more than that. In fact he merely attempted to state or define his

understanding of the meaning of the law. He said that smelting is a separate and distinct industry from that of mining, and therefore declared that it was not within the purview of the Act. He did not forbid the use of timber for roasting the ore. He did not say that such roasting was not within the permission of the Act. Nor did he apparently forbid private smelting when performed as an adjunct of mining, but only when carried on as a separate industry with which of course we have nothing to do here. Obviously the question whether *roasting* is part of the process of mining referred to in the Act is quite unaffected by the Secretary's definition of *smelting* as found in Rule Seven. If roasting be in fact a mining process then the Secretary could not prohibit it and presumably never intended to do so. The rule therefore is to be interpreted as not including the roasting of ore in its prohibition of smelting.

The difference between roasting and smelting is not merely technical but substantial. In smelting a chemical change in the ore itself is produced; in roasting there is no such process or result. Smelting includes fusion; roasting does not.

Some of the accepted definitions of smelting and roasting are as follows:

> WEBSTER.—"*Smelt.* To melt or fuse as ore for the "purpose of separating the metal from extraneous "substances."
>
> WEBSTER.—"*Roast.* To dissipate by heat the vola- "tile part of, as ores."
>
> WORCESTER.—*Smelt.* Same as Webster.
>
> WORCESTER.—"*Roast.* To expel volatile matter "from by exposing to heat, as ores."

Appellant quotes at large from the Standard Dictionary, which, however, was not published until 1895, seventeen years after the Act under consideration. The definitions there are as follows:

> STANDARD.—"*Smelt.* To obtain (a metal) from the "ore by a process that *includes fusion;* also, in a "more limited sense, to reduce (ores, sweepings, met- "allurgical products, etc.) by fusion in a furnace."
>
> "In its restricted sense smelting is confined to a "single operation, as the fusion of an iron ore in a "shaft furnace, the reduction of a copper matte in "a reverbatory furnace, and the extraction of a metal "from sweepings in a crucible, but in its general "sense it includes the entire treatment of the material "from the crude ore to the finished metal, and em- "braces (1) the calcination or roasting by means of "which the sulphur and other volatile constituents "are expelled (2) the reduction of the resulting "products in a furnace or the smelting proper, and "(3) the refining of the product from the second op- "eration."

> STANDARD.—"*Roast.* (The only definition applica- "ble here) To heat highly (metallic ores) with access "of air but *without fusing* for the purpose of driving "off or volatilizing impurities or for oxidizing "them."

In the present case the Court took judicial notice of the process of roasting as practiced in Arizona, and describing it said that it consisted of piling ore mixed with wood in the open air and igniting the wood, whereupon the sulphur and other combustible and volatile substances mixed with the ore were ignited and consumed or driven off in gas. This definition is controlling in this case.

In this process of roasting ore a material part, if not the

greater part of the necessary heat is supplied by the combustion of the materials themselves. No chemical change takes place in the metal; the burning produces a chemical change in the substance consumed but none in the metal. Free sulphur or sulphur in combination with other substances is separated from the metal, a separation which might be accomplished, though less satisfactorily by other mechanical means, such as washing or scraping.

On the contrary in smelting, the change is mainly a chemical one and thereby metals in chemical and mechanical combination with foreign substances are reduced to the molten state whereupon other substances called fluxes are artificially introduced into the mass, or brought into contact with it. These fluxes have a greater chemical affinity for these foreign substances than the metals themselves have. In this way the metal is freed from the foreign elements which then unite with the fluxes (*Encyclopedia Brit.,—Copper*). Such is the process of smelting, which is therefore radically different from the process of roasting as above defined, and manifestly the roasting processes of the defendant came neither within the letter nor the spirit of the rule of the Department of the Interior, forbidding the use of the timber in question for smelting purposes.

Second.—As to the validity of the regulation of the Secretary of the Interior.

Assuming for argument's sake that as claimed by the appellant the term smelting includes roasting and that roasting ore is within the prohibition of the regulation, it is submitted that the regulation to that extent is invalid.

It is out of the question to say that the Secretary can *construe or interpret* the Act. That is for the Courts to do. Nor is it claimed by the appellant that the Secretary may lawfully abridge or limit the rights of citizens to the use of the timber granted by the Act unless the Act itself confers that power. But this the Act does not do. We do not deny the power of Congress to clothe an executive officer with power to issue licenses, etc. in proper cases. But in the present instance Congress gave no such power. The Secretary was merely authorized to regulate the use of the privilege which was freely given to all the people of the Territory.

The appellant argues (Brief, p. 6) that Congress has authority "to grant a privilege or license and clothe an "executive officer with the right to grant or refuse or re- "strict such permission, etc." True, Congress might possibly have done so here, but did not see fit. The Act does not say that the Secretary may license the cutting of timber, but that "*All citizens, etc. shall be and are* hereby "authorized and permitted to fell and remove, etc., any "timber or tress, etc."

Nor does this record present any instance of matters unforeseen or equities not anticipated, such as the Court referred to in the *Williams* case (12 Pac., 851) in the language cited by the Attorney General (*Brief, p. 7*). In that case the regulation was a reasonable one for the protection of the undergrowth. It did not curtail the privileges granted by the Act but was intended to protect and conserve them.

Third.—Discussion of authorities cited by Appellant on this subject.

The other cases cited on this point by the appellant do not go further. *Re Kollock* (165 U. S., 526) was an oleomargarine case. The regulation required certain marks on packages, etc. The Court said:

> "The regulation is in execution of or supplemen-
> "tary to but not in conflict with the law itself, and
> "is specifically authorized thereby in effectuation of
> "legislation."

In *Field* v. *Clark*, 143 U. S., 649; *Caha* v. *United States*, 152 U. S., 211; *re Kollock*, 165 U. S., 526; *United States* v. *Ormsbee*, 74 Fed. Rep. 207; *United States* v. *Moline*, 82 Fed. Rep., 592, all cited by the appellant the acts performed by the officers in question were ministerial acts done in express conformity with the direction of the Acts of Congress respectively. The acts of said officers under such circumstances were all sustained.

The other citations of the appellant on this point are of similar character.

The power in any official to construe or regulate an Act of Congress so as to curtail or nullify its effect has never been sustained by this Court. The power to make rules and regulations in this as in all similar cases is limited to such rules as will aid and facilitate the operation of the Act, not such as will defeat or impede it.

Fourth.—Meaning of the phrase "for other purposes."

The Attorney General lays stress (*Brief p. 7*) on the phrase "and for other purposes" in Setcion 1 of the Act, which provides that the use of the timber is to be "subject

"to such rules and regulations as the Secretary of In-"terior may prescribe for the protection of the timber "and the undergrowth growing upon such lands *and for "other purposes,"* and says that thereby "the latitude "given to the Secretary would seem to be unlimited." What these other purposes are is not at once apparent; but they must certainly be lawful purposes; they must not be purposes hostile to the intent of the Act. Under that provision rules might possibly be made to regulate rival claims; to prevent forest fires; to obtain reports of timber cut, or any other matter of mere detail, but not to prevent or limit the use of the timber for mining purposes.

We concede that counsel for the appellant is right when he says that the logical result of his argument is to clothe the Secretary of the Interior with arbitrary power in this matter, but we deny that such a conclusion is justified. He says that the Secretary "is constituted the arbiter, "and that any limitation he may prescribe short of an "absolute suspension of the right, has the force of law "under the terms of this Act" (*Brief p. 11*). Accordingly he might say that smelting is not mining; that roasting is not mining; that shoring the mine walls is not mining; that this and that use is not agricultural; and unreasonably limit the seasons for cutting timber and thus practically nullify the Act as long as in form he did not absolutely suspend it. Such is the logical effect of the Attorney General's argument here. It seems to us to carry with it its own refutation.

Fifth.—The argument of contemporary construction.

The Attorney General cites numerous cases on page eleven of his brief to sustain the proposition that the

contemporaneous construction of an Act of Congress by those charged with its execution should not be disregarded by the judiciary unless the construction be clearly wrong and seeks by this argument to sustain the rules of the Department of the Interior. Most of the cases thus cited by the appellant state that where a contemporaneous interpretation has been given to a statute and it has been acted upon for years in accordance therewith, it will be followed if possible. But the rule in question was not issued contemporaneously with the passage of the Act. The Act was passed in 1878, and the rule was not promulgated until 1900. In the meantime no attempt had been made to limit the operation of the Act in any such way. In the year 1889, *United States* v. *Richmond Mining Co.*, 40 Fed. Rep., 415, was decided and a construction favorable to the appellee given the Act by the Supreme Court of Nevada. This case was never reviewed in this Court, and the construction there established was never seriously questioned till now. This appears from the case of *United States* v. *Copper Queen Consolidated Mining Co.*, 185 U. S., 495, where it was assumed by both sides that the Act was to be liberally construed in favor of the citizen and where this Court in dismissing the appeal on another point says (p. 497):

> "If he were (a citizen) there is no question made "about his right to cut."

The cases of *Pennoyer* v. *McConnaughy*, 140 U. S., 1; *United States* v. *Hill*, 120 U. S., 169; and *United States* v. *Philbrick*, 120 U. S., 52; *United States* v. *Johnston*, 124 U. S., 236; *Heath* v. *Wallace*, 138 U. S., 573 cited by the appellant on the point that the construction of the Department should control, differ from this case. Each of

those appeals presented instances of a long and well-established rule of construction or practice in doubtful cases, where no injustice or harm would follow its adoption. There was no attempt in any of these cases to nullify or restrict the operation of a remedial Act of Congress.

Sixth.—The penal clause in the Act.

The appellant refers to Section 3 of the Act providing that persons violating its provisions or the rules and regulations made in pursuance thereof shall be guilty of a misdemeanor. This only illustrates all the more forcibly our claim that the rule if it seriously restricts the operation of the Act is a nullity. It surely was not intended to say in the Act that citizens "shall be and are "hereby authorized" to use timber for mining purposes and then punish them for doing so under the same Act. In other words, the Secretary cannot enact and repeal criminal laws; he cannot create misdemeanors. His regulations to be lawful must be in *pursuance* of the Act, that is following it, in furtherance of its objects, not practically suspending it.

In conclusion.—The appellant's counsel asks that the judgment be reversed because he questions the policy of allowing the use of the timber on these mineral lands to the extent and for the purposes permitted by the Act. He says that the mountains of the region affected will be denuded and other evils follow if the present policy is persisted in. The facts to justify these conclusions are not before us, nor is this Court the proper body to pass

upon those facts. If they are as alleged the remedy is with Congress.

It is respectfully submitted that the judgment of the Supreme Court of Arizona is right and should be affirmed.

Dated, Washington, D. C., October Term, 1904.

ALFRED B. CRUIKSHANK,
Of Counsel for United Verde Copper Co.,
Appellee.

Supreme Court of the United States.

No. 68.—October Term, 1904.

The United States, Appellant, vs. The United Verde Coppper Company. } Appeal from the Supreme Court of the Territory of Arizona.

[January 9, 1905.]

Mr. Justice McKenna delivered the opinion of the Court.

Action brought by the United States against the appellee, which we shall call the Copper Company, for the sum of $38,976.75, the value of timber cut and removed from certain unsurveyed mineral land in the Territory of Arizona.

The timber or wood was alleged to have been cut by one Rafael Lopez, a resident and citizen of Arizona, and amounted to 6,496½ cords, of the value of $6 per cord, or the sum of $38,976.75.

It is alleged that the timber belonged to the United States, and "was used and consumed by the said defendant for the purpose of roasting ore at the United Verde Copper mines, said mines being the property of defendant herein, at Jerome, Yavapai County, Arizona Territory, in violation of the act of Congress of June 3, 1878, and of the rules and regulations of the Secretary of the Interior, promulgated under the authority of said act of Congress."

The Copper Company demurred to the complaint. The demurrer was sustained. The United States refused to amend, and judgment was entered for the Copper Company. It was affirmed by the Supreme Court of the Territory.

Section 1 of the act of June 3, 1878, upon which the action is based, is as follows:

"That all citizens of the United States, and other persons, *bona fide* residents of the State of Colorado or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time *bona fide* residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided*, The provisions of this act shall not extend to railroad corporations."

Section 2 makes it the duty of registers and receivers to ascertain whether any timber is being cut in violation of the provisions of the act, and, if so, to notify the Commissioner of the General Land Office thereof.

Section 3 makes violations of the act or of the rules and regulations made by the Secretary of the Interior misdemeanors, punishable by fine, not exceeding $500, "to which may be added imprisonment for any term not exceeding six months."

Among the regulations promulgated by the Secretary of the Interior were the following:

"4. The uses for which the timber may be felled or removed are limited by the wording of the act to 'building, agricultural, mining, or other domestic purposes.'

"5. No timber is permitted to be felled or removed for purposes of sale or traffic, or to manufacture the same into lumber or for any other use whatsoever, except as defined in section 4 of these rules and regulations.

* * * * * *

"7. No timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining.

* * * * * *

"10. These rules and regulations shall take effect February 15, 1900, and all existing rules and regulations heretofore prescribed under said act by this department are hereby rescinded."

The contention of the United States is that roasting ore is smelting, and that smelting is not a purpose permitted by the act of Congress, and is besides forbidden by the regulations of the Secretary of the Interior.

Roasting ore is defined by the Supreme Court of the Territory in its opinion as follows:

"It is a matter of common knowledge that in this Territory the roasting of ore at the mines from which it is taken is ordinarily accomplished by piling the ore and the wood mingled with it in piles in the open air, and by igniting the wood the fire is communicated to the sulphurous or other combustible ingredients in the ore, and thus by the heat generated by its own combustion and that of the wood mingled with it, the volatile substances are driven off in vapor, smoke, and gases from the ore thus treated. By this treatment the ores that are extremely sulphide or highly charged with other volatile substances are relieved from a large portion thereof and are the more readily treated by smelting or other processes of reduction, and besides require less fluxing material for such reduction, and are also lighter in weight, and for that reason when shipped to other points for smelting or further treatment of any kind cost less for freight."

The court distinguished this process from smelting, and decided that it is, in practice, a part of mining. It is a step, the court reasoned, in the extraction of the ore from the mine, and the separation of the ore from the rock enclosing it. Roasting ore, therefore, is preparation for smelting, but not smelting, which, according to all of the definitions, is something more than melting—it is obtaining the metal by heat and such reagents as de-

velop it. Roasting is done crudely in the open air by burning wood and ore mingled in a pile. Smelting is the function of an organized plant. But roasting ore, regarding the production of metal only is a preliminary step to smelting, and counsel for the Government makes much of that circumstance. If this were all that is necessary to consider, the deduction would be easy that wood used for roasting ores is used for smelting purposes.

But the dependence of industries, one upon another, does not make them the same, and the division of labor between them is not as marked in new as in old communities, having a more varied industrial development. Regarding, therefore, the conditions which existed in the mining States and Territories, roasting ore was more naturally a part of mining than of smelting. The assignment, however, is unimportant in the view we take of the statute, and whether roasting ore be considered a part of mining or of smelting, the use of timber for it has the sanction of the statute.

The statute provides "that all citizens of the United States . . . shall be and are hereby authorized and permitted to fell and remove for building, agricultural, mining, or other *domestic* purposes, any timber." The special enumeration of industries is "building, agricultural, and mining." But the permission of the statute is not confined to these. It extends to "other domestic purposes." The limitation of the other purposes is in the word "domestic."

Counsel for the Government recognizes this, and substitutes for "domestic" the word "household," and contends that the word "other" should be treated as an intruder and eliminated from the statute, and making the latter read that timber may be felled for "building, agricultural, mining or *domestic* purposes." But we are not permitted to take such liberty with the statute, if "domestic" has a meaning consistent with the intentional use of the word "other." It has such meaning. It may relate, it is true, to the household. But, keeping its idea of locality, it may relate to a broader entity than the household. We may properly and accurately speak of domestic manufactures, meaning not those of the household, but those of a county, state or nation, according to the object in contemplation. So in the statute the word "domestic" applies to the locality to which the statute is directed, and gives permission to the industries there practiced to use the public timber. This definition of "domestic" gives the word an apt and sensible meaning, and we must regard the association of the word "other" with it as designed, not as accidental.

The statute was passed on in *United States* v. *Richmond Mining Co.*, (40 Fed. Rep. 415,) in 1889. In that case the United States sued in replevin for 10,000 bushels of charcoal made from wood which was cut on mineral land in the State of Nevada. The Richmond Mining Company was engaged in the business of mining, purchasing and reduction of ores,

and bought the charcoal "to be used in the reduction of ores and refining the product thereof." The court held that such use was a domestic purpose within the meaning of the statute. The court said that if reducing ores by melting or furnace process, and refining the bullion, is not properly a part of mining, "it is certainly incident to it and closely connected with it." The court, however, did not dwell on that point, but put its judgment in favor of the mining company upon the ground that reducing ores was "a domestic industry of the highest importance to the miner and to the public," and was within "the benefits conferred by the statute." It will be observed that the industry which was given the benefits of the statute was more than smelting in the strictest sense, and the decision was acquiesced in for eleven years by the Interior Department. It was a rule of rights and conduct for that time, and its overturn might involve civil liability for acts which were done under the sanction of the statute as judicially construed. We should hesitate, therefore, to reverse that construction, even if it were more doubtful than it is.

But the Government relies on the rules and regulations of the Secretary of the Interior, promulgated under, as it is contended, the authority of the statute since *United States* v. *Richmond Mining Co.* was decided. No. 7 of those regulations provides that "no timber is permitted to be used for smelting purposes, smelting being a separate and distinct industry from that of mining." By this the Secretary of the Interior may have intended to supersede the ruling in *United States* v. *Richmond Mining Co.*, but to which industry the roasting of ore shall be assigned the Secretary does not say, and the considerations which we have expressed apply as well to the regulation as to the statute. But there is a more absolutely fatal objection to the regulation. The Secretary of the Interior attempts by it to give an authoritative and final construction of the statute. This, we think, is beyond his power. Smelting may be a separate industry from mining, but that does not deprive it of the license given by the statute. As we have already said, the general clause, "*other domestic purposes*" is as much a grant of permission to the industries designated by it to use timber as though they had been especially enumerated, and their rights are as inviolable as the rights of the industries which are enumerated. The industries meant by the general clause may receive indeed limitation from those enumerated; in other words, be limited to the conditions existing in the mining States and Territories when the statute was enacted, but there can be no doubt that smelting has such relation. If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary. Congress has selected the industries to which its license is given, and has entrusted to the Secretary the

power to regulate the exercise of the license, not to take it away. There is, undoubtedly, ambiguity in the words expressing that power, but the ambiguity should not be resolved to take from the industries designated by Congress the license given to them or invest the Secretary of the Interior with the power of legislation. The words of the statute are that the felling and use of timber by the industries designated shall be "subject to such rules and regulations as Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, *and for other purposes.*" The ambiguity arises from the words which we have italicized. They express a purpose different from the protection of the timber and undergrowth, but they cannot, we repeat, be extended to grant a power to take from the industries designated, whether by the general clause or the specific enumeration, the permission given by Congress.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 68.—October Term, 1904.

The United States, Appellant
vs.
The United Verde Copper Company.
} Appeal from the Supreme Court of the Territory of Arizona.

[January 9, 1905.]

Mr. Justice Brown dissenting.

I am unable to concur in the construction put by the court upon the statute of June 3, 1878. Bearing in mind that the policy of the Government has been to preserve its rapidly diminishing areas of forest lands for the benefit of the whole people, any statute which permits timber to be cut by individuals should be narrowly construed.

In my view, the license given to citizens of the United States and residents of the States and Territories named, "to fell and remove, for building, agricultural, mining or other domestic purposes," timber and trees growing upon the public lands should be confined to timber intended to be used for structural or household purposes, and not be extended so far as to authorize the consumption of timber in manufacturing or other business operations. The word "building" explains itself. "Agricul[illegible]" would include timber used for houses, barns, tools, furniture and [illegible]ces. The word "mining" was doubtless intended to include not only the buildiugs necessary for mining operations, but such timber as is used in shoring up the walls of the mine, and perhaps also in operating the hoisting engines, but not that used for consumption in the treatment of ores.

It is true the words "other domestic purposes" are susceptible of two constructions. The word "domestic," when used in connection with the words commerce, manufactures or industries, is significant of locality, and is contradistinguished from foreign, but when used in connection with the word "purposes" it is most nearly analogous to "household." The difficulty with the former construction is that it practically liberates the word from all restrictions. If it be construed as referring to locality, what is the locality to which it should be confined? Is it the immediate neighborhood, township, county or State, or may it be given the same construction as given to it in connection with the words commerce or manufacturing, and be extended to the whole United States? If either of these constructions were possible, it would result in the destruction of all timber standing

upon public mineral lands, as well as in an unfair discrimination against those less favorably situated, who are compelled to pay for the fuel consumed in the treatment of ores. I do not think the word "other" can be used as an enlargement of the word "domestic," and that it should be confined, as are the preceding words, to timber used for other analogous structural purposes and for household consumption—in short, to other purposes domestic in their character.

For these reasons I am contrained to dissent from the opinion of the court.

I am authorized to state that Mr. Justice HARLAN and Mr. Justice PECKHAM concur in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.